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THE MONTFORT HOSPITAL DECISION AND MINORITY LANGUAGE RIGHTS

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> "This is not even a case about the fate of a hospital, but rather a case about the place of that hospital in the cultural/linguistic milieu of francophone minority rights in Ontario."
>
> – The Divisional Court

INTRODUCTION

The fate of Montfort Hospital, a French-speaking health institution in Ottawa, has become linked in the public mind with several current policy concerns -- the national unity question, access to health care, minority language rights, and whether courts should alter the decisions of elected representatives. This backgrounder attempts to situate the Montfort Hospital issue in a broader context by explaining the positions of the parties to the dispute and summarizing the Court's reasons for its decision.

THE CONTROVERSY

In February 1997 the Health Services Restructuring Commission (HSRC) ordered the Montfort Hospital to close. Several weeks after the HSRC's initial announcement 10,000 francophones and anglophones demonstrated against the decision at the Ottawa Civic Centre. One month later, a stakeholder group, "SOS Montfort", produced a petition with 150,000 signatures. The Senate of Canada adopted a special resolution in support of the hospital. Hockey star Guy Lafleur became involved in the campaign. The Bloc Québecois donated $10,000 to the SOS Montfort group for an advertising campaign inside Québec.

In August 1997 the HSRC reversed its decision and ordered that Montfort would remain open, but that it would no longer provide acute care; nor would it house an emergency room. The hospital would become an ambulatory care centre (i.e. one mainly catering to the needs of discharged patients). Montfort would provide day surgery and a total of 66 beds (subsequently increased to 88) as well as a 24-hour "urgent care centre" (but not an emergency room). The HSRC also ordered the Ottawa General Hospital, the Heart Institute and the Children's Hospital of Eastern Ontario (CHEO) to seek full designation as bilingual institutions under the *French Language Services Act*[1]. The HSRC also ordered the establishment of a French Language Services Health Network in Ottawa.

On November 29, 1999, three judges of the Superior Court of Justice (Divisional Court) overturned the HSRC's Directions. The HSRC was ordered to reconsider its decision and to make a recommendation to the Minister of Health.[2] Ontario's Attorney General, Jim Flaherty, expressed concern about the overturning by the judicial branch of a decision made by a commission, stating that the ruling "raises issues of judicial activism, of judge-made law and what is the role of the courts and what is the role of Parliament and legislatures."[3]

THE PARTIES TO THE DISPUTE

The Applicants

The individuals who challenged the hospital closure at the Divisional Court were Michelle de Courville Nicol, a member of the Board of the hospital and its president since 1995, and Gisele Lalonde, an active member of the Franco-Ontarian community in Ottawa-Carleton and a former mayor of the City of Vanier.

The Health Services Restructuring Commission

The HSRC was established in April 1996. It was given the power to issue "Directions" to the board of a hospital under the *Public Hospitals Act*.[4] The Directions could include an order to the hospital to close or to amalgamate with another hospital. The *Act* also requires the decision-maker to take the public interest into consideration when issuing a direction to close a hospital.[5]

The Hospital

The Montfort Hospital was established in 1953 in eastern Ottawa (Vanier) and initially provided services exclusively in French. The nearby area is home to 200,000 Franco-Ontarians. In 1984 the hospital began offering bilingual services. However, it remained the only hospital in Ontario which operated in French. The hospital also functioned as a

[1] *French Language Services Act*, R.S.O. 1990, c. F.32.
[2] *Lalonde* v. *Ontario (Commission de Restructuration des Services de Santé)*, [1999] O.J. No. 4488 (Div. Ct.).
[3] "Unfinished business," *Globe and Mail*, 17 December 1999, p. A24.
[4] This power has subsequently been withdrawn. O. Reg 87/96 gave the HSRC the power to issue directions in the place of the Minister of Health under s. 6 of the *Public Hospitals Act*, R.S.O. 1990, c. P.40. On April 29, 1999 O. Reg. 293/99 revoked O. Reg. 87/96. Further, O. Reg. 272/99, also passed on April 29, 1999, specified that the duty of the HSRC was to advise the Minister.
[5] *Public Hospitals Act*, s. 6(1).

training centre for University of Ottawa family practice residents in an exclusively French language milieu, offering the only French language family medicine training programme outside Québec.

INVOLVEMENT OF THE FEDERAL GOVERNMENT

The Federal government has become involved in the Montfort Hospital issue because of its interest in preserving French language institutions outside of Québec as part of its commitment to bilingualism and biculturalism. In December 1998 the Restructuring Co-ordination Task Force (composed of the deans of the faculties of Medicine and Health Sciences at the University of Ottawa and the CEOs for the Ottawa Hospital and of Montfort Hospital) issued a report warning that the medical students of the University of Ottawa would lose a vital French-language teaching facility unless the Montfort hospital were permitted to keep its emergency department and 50 acute-care beds. In January 1999 the federal government announced that it was establishing a $10 million programme to establish an Ottawa teaching centre to train French-speaking physicians and other health professionals outside Québec. It was hoped that this announcement would save the Montfort Hospital from closure given its unique, predominately francophone character.

NATURE OF THE COURT PROCEEDING

The Court hearing the application is a specialised branch of the Ontario trial court that deals with administrative law. The procedure by which the applicants challenged the decision is called "judicial review", which is the body of law governing the relationship between administrative agencies, such as the HSRC, and the Courts. When the Divisional Court hears applications for judicial review it sits in panels of three. In this case, the judges who heard the case in Ottawa were justices Robert Blair of Toronto, James Carnwath of Brampton and Michel Charbonneau of Hawkesbury.

A number of hospital closures and amalgamations have been challenged at the Divisional Court. In one of the first cases which went to judicial review, Justice Campbell of the Divisional Court observed that the court had a limited role to play in reviewing decisions made by the HSRC, and that the only reason for which an HSRC decision could be overturned by the Court was if the HSRC had made a legal error.[6]

DECISION OF THE DIVISIONAL COURT

Minority Language Rights as Interpreted by the Supreme Court of Canada

Three justices of the Divisional Court sitting in Ottawa overturned the HSRC's Directions in a unanimous decision issued on November 29, 1999. The Court was persuaded by arguments presented by the applicants that the HSRC had failed to take into consideration the fundamental constitutional principle of minority rights in making its

[6] *Pembroke Civic Hospital* v. *Ontario (Health Services Restructuring Commission)* (1997), 36 O.R. (3d) 41 (Div. Ct.).

decision. The Supreme Court of Canada, in the *Reference re. Secession of Quebec,*[7] had previously identified this principle as a fundamental notion underlying the Canadian constitution, along with three others – federalism, democracy, and the rule of law. The Supreme Court observed that these principles were "not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."

Legal Provisions Concerning Language Rights

Section 133 of the Constitution[8] provides for the use of both English and French in the Parliament of Canada as well as in the Québec National Assembly. Sections 16-23 of the *Canadian Charter of Rights and Freedoms* provide that both English and French are the official languages of Canada, and indicate that both official languages may be used in Superior Courts (which are established by Parliament) as well as in communications between the public and federal institutions. Minority language education rights at the primary and secondary school level are also outlined. Counsel for the HSRC argued that these provisions, in conjunction with the *French Language Services Act*, constituted a "complete code" for the protection of minority language rights in Ontario, with the result that no one had an additional entitlement to French language health care services.

The Divisional Court responded that language rights ought to be interpreted liberally, drawing upon a recent decision of the Supreme Court of Canada concerning the right of a francophone to a bilingual criminal trial in British Columbia.[9] The Divisional Court determined that the contents of the *French Language Services Act* were "part of the unfinished edifice of fundamental language rights pertaining to the francophone minority in the field of health care in Ontario." Consequently, minority language rights could be interpreted to include the rights of francophones to receive health care services in their mother tongue in a predominately French language setting.

The Divisional Court's Interpretation of Minority Language Rights

A key aspect of the applicants' successful case was that they persuaded the Divisional Court that the provision of bilingual services was insufficient to protect minority language rights. Counsel for the HSRC argued (unsuccessfully) that in asking the Court to overturn the HSRC's decision, the Court was effectively re-interpreting minority language rights to include the right to French language health services and French language post-secondary medical education, which are not specifically mentioned in the *Canadian Charter of Rights and Freedoms*.

In response to the argument that the HSRC had taken into consideration the need for francophones to obtain health services in their mother tongue, the Court observed that "the reality is that designation under the *French Language Services Act* is not, in itself, a guarantee of adequate services in French." The Court noted that in contrast to the predominately French language character of the Montfort Hospital, at the University of Ottawa hospital, a designated bilingual centre under the *French Languages Services*

[7] *Reference re. Secession of Québec,* [1998] 2 S.C.R. 217.
[8] *Constitution Act, 1867* (U.K.), 30 & 31 Vic., c. 3.
[9] *R.* v. *Beaulac,* [1999] 1 S.C.R. 768.

Act,[10] the language of operation is English. Medical charts are drawn up and maintained in English rather than in French. Conferences and discussions among medical professionals take place in the English language.

The Court accepted the evidence of a University of Ottawa sociologist Roger Bernard, who developed a theory first formulated in 1961 by University of Toronto sociologist Raymond Breton concerning the importance of institutions such as hospitals in safeguarding cultural communities. The Court accepted Bernard's evidence that "institutional completeness" meant that bilingual institutions were insufficient to safeguard francophone language and culture, because in bilingual settings francophones tend to speak English in the presence of unilingual anglophones. The Court stated that "in a minority setting, bililngualism risks becoming the first stage of assimilation of the minority bilingual group." The Court found that the HSRC had failed to take into consideration whether francophones could have their French-language health care needs met at a bilingual health care institution.

Appeal of the Divisional Court Decision

Reaction to the decision highlighted its broad ramifications. University of Ottawa law professor Joseph Magnet described the decision to the media as "very innovative, very novel, potentially very broad."[11]

On December 13, 1999, the HSRC announced that it was seeking permission (i.e. "leave") from the Ontario Court of Appeal to appeal the decision. The HSRC's mandate expires at the end of March 2000, with the result that the province may take up the HSRC's case on its behalf.

[10] The *French Language Services Act* provides that a person has the right to receive services in French from any publicly-funded agency that provides services to the public and is designated as a public service agency.

[11] Colin Grey, "Montfort ruling strikes strong blow for minority rights: Court goes beyond written law in upholding 'underlying principle,' *Ottawa Citizen*, 1 December 1999, p. A1.